REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 204 OF 2014

NAKURU AUTOMOBILE HOUSE LTD.....……...PLAINTIFF

VERSUS

LAWRENCE MAINA MWANGI…….…....….1ST DEFENDANT

DISTRICT LAND REGISTRAR NAKURU…....2ND DEFENDANT

RULING

(Application to re-open plaintiff's case so as to adduce more evidence including documentary evidence; applicant did not disclose the nature of the witness to be called and did not also avail a copy of the document sought to be produced; held that there was no full disclosure; application dismissed)

1. Hearing of the plaintiff's case in this matter commenced on 30th March 2017. One witness testified after which plaintiff's case was closed. Defence case was to start on 31st May 2017 but on that date the defence sought an adjournment. A new date of 28th September 2017 was scheduled for defence hearing. However, on 23rd June 2017, the plaintiff filed Notice of Motion dated 21st June 2017. It is that application that forms the subject of this ruling. The following orders are sought in the application:

a) ***Spent.***

b) ***This honourable court be pleased to grant the plaintiff/applicant leave to re-open its case and call on (sic) most important witness to the case who was not within the plaintiff's knowledge when prosecuting its case which witness is very important in this case at the next hearing date.***

c) ***Costs of the application abide the outcome of the suit.***

2. The application is supported by an affidavit sworn by Vijay Morjaria, the Managing Director of the plaintiff company. He deposes that after the plaintiff's case was closed, he discovered that the Director of CID has very important information and documentary evidence that is important for the determination of this case and that he became aware of this after the last adjournment.

3. The application is opposed by the 1st defendant through his replying affidavit sworn on 11th September 2017. He deposes that the application is an afterthought aimed at filling gaps in the plaintiff's case which became evident after the plaintiff's case had been heard and closed. He added that there is nothing to show that the witness now sought to be called or the evidence now sought to be adduced could not have been called or adduced earlier. He urged the court to dismiss the application. The 2nd defendant neither participated in the hearing nor responded to the application.

4. The application was argued by way of written submissions. Applicant's submissions were filed on 3rd October 2017 while 1st defendant's submissions were filed on 11th October 2017. I have considered the application, the affidavits filed and the submissions.

5. There is no doubt that the court has discretion to allow re-opening of a case in appropriate circumstances. Needless to state, such discretion must be exercised judiciously and with a view to doing justice between the parties. The court must also be careful not to allow abuse of its processes. Re-opening of a case is an equitable remedy. Therefore, he who seeks this remedy must act equitably and must approach the court with clean hands.

6. In the present case the applicant says that the director of what was formerly called Criminal Investigations Department has very important information and documentary evidence that is useful for determination of this case. The applicant has not exhibited any draft Supplementary List of Witnesses, Witness Statement or Supplementary List of Documents. Similarly, no copy of the proposed documentary evidence has been availed. Since the advent of Civil Procedure Rules, 2010 Order 3 rule 2 has provided as follows:

> **2. All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—**
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> > **(*a*) the affidavit referred to under Order 4 rule 1 (2);**
> >
> > **(*b*) a list of witnesses to be called at the trial;**
> >
> > **(*c*) written statements signed by the witnesses excluding expert witnesses; and**
> >
> > **(*d*) copies of documents to be relied on at the trial including a demand letter before action:**
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> **Provided that statement under sub rule (*c*) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.**

7. Additionally, Order 11 of the Civil Procedure Rules 2010 has elaborate provisions aimed at preparing suits for trial. The whole idea is that each party should approach litigation with full disclosure such that the opponent knows the exact case that they will meet. Our system of litigation no longer has room for the old practices where litigants would hold their cards close to their chests only to spring a last minute surprise on the opposite party. An application to re-open a case so as to adduce additional evidence must now be viewed against the new regime requiring full disclosure. The applicant herein has totally failed the disclosure test.

8. Other principles governing an application such as the one before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate. While considering a similar application in **Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR** Kasango J. stated:

> **17. Uganda High Court, Commercial Division in the case SIMBA TELECOM –V- KARUHANGA & ANOR (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case SMITH –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256 where it was held:**
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> **"If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which**

reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

18. The Ugandan Court in the case SIMBA TELECOM (supra) held thus:

"I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not." …..

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay.

9. What the applicant wishes to adduce is what can be referred to as formal evidence. It is evidence in the hands of a formal state institution and in a documentary form. There must have been formal records leading up to the point where the evidence was collated and brought to the attention of the applicant. The applicant ought to have availed the paper trail to enable the court to determine if the evidence is new and if it was not possible for the applicant to adduce it prior to closing its case. In the absence of all these details, there is real risk that prejudice will be occasioned to the defendants if the application is allowed. Further, even if I were to allow the application, there is no telling what trajectory the case will now take since the evidence sought to be adduced has not been laid bare. As already noted, trials should proceed transparently under clearly defined confines and certainly not in an open ended manner.

10. For all the foregoing reasons, I am not persuaded that the applicant has made out a case for granting the orders sought. Notice of Motion dated 21st June 2017 is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 20th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Maina holding brief for Mr. Kimatta for the plaintiff/applicant

Mr. Karanja for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistant: Gichaba